Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
JAN 1 2 2006
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY CLERK

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CAUSE NO. A050A334 SS
	§	
FULBRIGHT & JAWORSKI, LLP,	§	
	§	
Defendant.	§	

DEFENDANT FULBRIGHT & JAWORSKI, LLP'S SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION TO COMPEL TESTIMONY OF SARAH BRASHEARS

COMES NOW, Fulbright & Jaworski, LLP ("Fulbright"), and files this Supplemental Response to Plaintiffs' Motion to Compel Testimony of Sarah Brashears and in support thereof, would respectfully show the Court as follows:

Fulbright is aware that this Court generally does not accept briefing beyond a Motion, Response, and Reply, but respectfully requests that the Court consider the matters addressed in this brief Supplemental Response.

I. Fulbright did not waive any privilege

Only in their Reply brief did the Plaintiffs suggest that Fulbright had waived the privileges that apply to conversations with Sarah Brashears. The Plaintiffs claim that "Fulbright has voluntarily disclosed the contents of the communications between Tom Paul and Ms. Brashears." (Reply, p. 8.) Fulbright has done no such thing. The deposition excerpts attached to Plaintiffs' Reply reveal that Marc Delflache, who was deposed as Fulbright's 30(b)(6) witness, testified that his source of information in preparing for the deposition was Tom Paul. Mr.

23

Dockets.Justia.com

Delflache therefore could not have revealed the content of any conversation with Sarah Brashears; he was insulated from the communications with her and was not privy to their scope and substance. Accordingly, the Plaintiffs are incorrect in suggesting that he was capable of waiving privilege as to conversations, and are therefore missing a critical link in their claim of privilege waiver: Fulbright's 30(b)(6) witness had no discussions with Ms. Brashears, and he testified only as to information he obtained from other sources. No waiver could occur under such circumstances.

It is true that Tom Paul, at his deposition, testified as to the substance of some of his discussions with Ms. Brashears. However, he did so only after Plaintiffs' counsel ***explicitly stipulated*** that the testimony would not constitute a waiver of Fulbright's privilege:

> MR. GOLUB: If you will agree that Mr. Paul is not – him discussing it in the deposition today is not a waiver of discussions that Fulbright has had with Ms. Brashears or others as part of their investigation in this case, then I will let him answer the question regarding his communications with Ms. Brashears –
>
> MR. FIELDING: Okay.

(Reply, Exhibit C, p. 125.)

In sum, Mr. Delflache did not – and could not have – revealed anything said by Ms. Brashears, and the Plaintiffs stipulated that Mr. Paul's revelation of conversations with Ms. Brashears did not constitute a waiver of privilege. The Plaintiffs' reliance on Tom Paul's testimony regarding their waiver issue, no matter how it is spun, is an attempt to bring in through the back door what the Plaintiffs stipulated they would not do: claim that testimony of Tom Paul would not constitute a waiver of Fulbright's privilege.

A recent case from the Northern District of Illinois is instructive: in that case, a 30(b)(6) witness testified that he had been involved in conversations with a party employee and the party's attorney. *Western United Life Assurance Co. v. Fifth Third* Bank, No. 02 C 7315, 2004

WL 2583916 (N.D. Ill. Nov. 12, 2004). Because the party producing the 30(b)(6) witness had introduced some testimony regarding those conversations, the opposing counsel claimed that privilege had been waived. *Id.* at *1. The court wrote:

> Obviously, discussions such as the one at issue here are going to occur in the course of preparing a Rule 30(b)(6) deponent. . . . The exchange . . . that occurred at the deposition—the exchange which Fifth Third deems a waiver of the attorney-client privilege—merely confirms that such a conversation occurred, and rather tersely suggests what the topic of that discussion was. Finding a partial disclosure and resultant waiver based on this exchange would be tantamount to finding a waiver based on the mention and cursory description of a document in a privilege log.

Id. at *4.

Mr. Delflache's testimony provides even less fodder for a claim of waiver. He was unable to confirm that any conversation occurred with Ms. Brashears, much less suggest the topic of such a conversation. He engaged in an investigation that, by design, did not involve engaging in discussions with outside parties, and so he did not waive any privilege regarding communications with outside parties.

II. The Motion is moot; Plaintiffs have obtained the information they sought

It must be emphasized that the testimony from Mr. Paul, whom the Plaintiffs deposed after they filed their Motion to Compel, moots the alleged need for testimony regarding the substance of the discussions between Mr. Paul and Ms. Brashears. While Fulbright firmly believes that the communications are protected by privilege, it permitted Mr. Paul to testify regarding the substance of his communications with Ms. Brashears in an attempt to avoid further conflict on the matters raised in the Plaintiffs' Motion to Compel. Now that the Plaintiffs have obtained that testimony, the Plaintiffs' motivation in continuing to press their Motion to Compel before this Court is questionable at best. Ms. Brashears has freely testified as to facts that comport with what Mr. Paul testified she told him; to force Ms. Brashears to appear for yet another deposition to tell the Plaintiffs again what her recollection is of those facts, and to state that she relayed those facts to Mr. Paul (facts about which Mr. Paul already testified) would be an exercise in needless redundancy, at the cost of a posse of lawyers traveling to California for a few minutes of deposition testimony.

III. Conclusion and Prayer

Fulbright respectfully requests that Plaintiff's Motion to Compel Deposition Testimony of Sarah Brashears be denied, that reasonable expenses be awarded to Fulbright, and that Fulbright be awarded such additional relief to which it may be entitled.

Respectfully submitted,

By: ______________________
David J. Beck
Texas Bar No. 00000070
Geoff A. Gannaway
Texas Bar. No. 24036617
1221 McKinney St., Suite 4500
Houston, Texas 77010-2010
Telephone: (713) 951-3700
Facsimile: (713) 951-3720

ATTORNEYS FOR DEFENDANT
FULBRIGHT & JAWORSKI, LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served as shown below on counsel of record on January 12, 2006.

Via Facsimile and Certified Mail, Return-Receipt Certified
Michael P. Lynn, P.C.
Jeffrey M. Tillotson, P.C.
John D. Volney
Jeremy Fielding
Lynn Tillotson & Pinker, LLP
750 N. St. Paul St., Suite 1400
Dallas, Texas 75201

Geoff A. Gannaway

388 00006/311299 1